UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BOSTON & ASSOCIATES, LLC

and Case 14–CA–119200

INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, DISTRICT COUNCIL #58

Kathy Talbott-Schehl, Esq.,
for the General Counsel.
James Simeri, Esq.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS M. RANDAZZO, Administrative Law Judge. This case was tried in St. Louis, Missouri, on June 11, 2014. The International Union of Painters and Allied Trades, District Council #58 (the Charging Party or Union)[1] filed the charge on December 17, 2013, and the amended charge on February 3, 2014. The General Counsel issued the complaint and notice of hearing in this matter on March 28, 2014.[2]

The complaint alleges that Boston & Associates, LLC (the Respondent), violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by: (1) withdrawing its recognition of the Union as the exclusive collective-bargaining representative of the unit employees, effective August 31, 2013, and (2) failing and refusing to abide by the successor collective-bargaining agreement negotiated by the Union and the Painting and Decorating Contractors of America, Chapter #2, affiliated with the Finishing Contractors of America (the Association), which is effective by its terms from September 17, 2013 through August 31, 2016. The Respondent, in its answer and amended answer, denied, inter alia, that it violated the Act as alleged.

[1] The name of the Union was amended at the hearing to reflect the merger of District Council #2 with District Council #58.

[2] All dates are in 2013 unless otherwise indicated.

On the entire record,[3] including my observation of the demeanor of the witnesses,[4] and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability corporation with an office and place of business in Florissant, Missouri (Respondent's facility), has been engaged in the business of being a painting contractor in the construction industry. Annually, Respondent, in conducting its business operations described above, provides services valued in excess of $50,000 for contracting businesses, such as Whiting-Turner Contracting Company and Roufa Construction d/b/a Tri-Co. Inc., Commercial, which are engaged in interstate commerce, on projects located in the State of Missouri.

The Respondent admits,[5] and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED STATUS OF THE UNION AS A LABOR ORGANIZATION, DISTRICT COUNCIL #58 AS A SUCCESSOR TO THE UNION, RESPONDENT'S OWNER AS AN AGENT OF THE RESPONDENT, THE ASSOCIATION'S STATUS AS A MULTI-EMPLOYER BARGAINING ASSOCIATION, AND THE APPROPRIATE BARGAINING UNIT

The Respondent, besides denying the merits of the unfair labor practice allegations set forth in the complaint, also denies other relevant allegations, such as the allegations that the Union is a labor organization within the meaning of Section 2(5) of the Act, District Council #58 is a successor to District Council #2, Evelyn Boston is an agent of the Respondent within the meaning of Section 2(13) of the Act, the multiemployer bargaining association is an association

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[3] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "GC Br.." for the General Counsel's Brief; and "Resp. Br.." for Respondent's brief.

[4] In making my findings regarding the credible evidence, including the credibility of the witnesses, I considered the testimonial demeanor of such witnesses, the content of the testimony, and the inherent probabilities based on the record as a whole. In certain instances, I may have credited some but not all, of what the witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). See also *J. Shaw Associates*, LLC, 349 NLRB 939, 939–940 (2007). In addition, I have carefully considered the testimony in contradiction to my factual findings, but I have discredited such testimony.

[5] The Respondent initially denied in its answer, but subsequently admitted in its amended answer dated June 10, 2014, that it was engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

with the purpose of representing employer-members for purposes of collective bargaining, and Respondent's employees constitute an appropriate bargaining unit.

A. The Union's status as a labor organization and the subsequent merger of the Union with successor District Council #58

The complaint was amended at hearing to allege that at all material times, the International Union of Painters and Allied Trades, District Council #2 has been a labor organization within the meaning of Section 2(5) of the Act, and on or about March 15, 2014, the Union merged with International Union of Painters and Allied Trades, District Council #58. Thus, the complaint alleges that District Council #2 is a labor organization that merged into District Council #58, thereby continuing the representative entity of the Union in essentially unchanged form, and that since March 2014, District Council #58 has been, and continues to be, a successor to District Council #2. The Respondent denied these allegations on the alleged basis that it had insufficient information to admit or deny the allegation, and therefore, it denied that the Union is a labor organization within the meaning of Section 2(5) of the Act, and that District Council #58 is a successor to the Union.

Section 2(5) of the Act states that a labor organization is:

> . . . any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The General Counsel presented the undisputed testimony of Union District #58 Organizer Wendell Harris, who credibly testified that he was an organizer for District #2, and after the merger, became an organizer for District #58. Harris testified that employee members participate in the Union by running for union office, serving as union stewards, representing employees with regard to grievances, and voting on collective-bargaining agreements. He testified that the union members agree to, and are bound by, the Union's bylaws, and therefore acknowledge compliance with the bylaws. According to the testimony of Harris, the purpose of the Union is to represent employees regarding disputes with employers, and that such purpose is documented in collective-bargaining agreements between the Union and employers. In addition, Harris testified that the Union represents its members with regard to terms and conditions of employment, such as labor disputes and grievances.

The undisputed record clearly establishes that the Union and its successor, District Council #58, are organizations in which employees participate and which exist for the purpose, in whole or in part, for dealing with employers concerning working conditions and terms and conditions of employment for employees. Therefore, I find District Council #2 and District Council #58 are labor organizations within the meaning of Section 2(5) of the Act.

With regard to the merger of the Union into District Council #58, its successor, the Board has held that an employer's obligation to recognize and bargain with an incumbent union will continue with the successor union after a merger or affiliation, unless there is a lack of continuity of representation. *Raymond F. Kavis Center for the Performing Arts*, 351 NLRB 143, 147

(2007). The Board has noted that the United States Supreme Court's decision in *NLRB v. Financial Institution Employees Local 1182*, 475 U.S. 192, 206 (1986), indicated that with respect to the continuity of representative factor, the general test for determining whether the affiliation or merger of a bargaining representative with another labor organization raises a question concerning representation is whether the affiliation or merger produces a change that is "sufficiently dramatic" to alter the identity of the bargaining representative. Id; *May Department Stores*, 289 NLRB 661, 665 (1988), enfd. 897 F.2d 221 (7th Cir. 1990); *Western Commercial Transport*, 288 NLRB 214 (1988). In addition, the Board has placed the burden of making such a showing on the party seeking to avoid its bargaining obligation. Id; See *CPS Chemical Co.*, 324 NLRB 1018, 1020 (1997); See also *Sullivan Bros. Printers, Inc*. 317 NLRB 561, 562 (1995).

The credible testimony of Harris and Gregg Smith, the District Council #58 business manager and secretary-treasurer, reveals that the merger of District Council #2 into District Council #58 was the result of the International Union's mandate which was in compliance with the International Union's constitution and bylaws. Smith testified that with the merger, the Union's staff remained the same and there were no changes for the union members with regard to fees, dues, and members' obligations. He also testified that the pension and welfare funds remained the same and the District Council #2 members participated in the District Council #58 activities. The Respondent, despite its objection to the amendment to the complaint, failed to offer any evidence to rebut the credible testimony of Harris and Smith, and therefore it failed to satisfy its burden. I find that with the merger of the Union into District Council #58, the evidence establishes there has been no substantial impairment or reduction of Union's local autonomy, and therefore continuity of representation has been preserved. Accordingly, the Respondent was obligated to recognize and bargain with District Council #58. *Raymond F. Kavis Center for the Performing Arts*, supra.

B. Evelyn Boston's status as an agent of the Respondent within the meaning of Section 2(13)of the Act

The complaint alleges that Evelyn Boston is a supervisor within the meaning of Section 2(11) of the Act, and an agent of the Respondent within the meaning of Section 2(13) of the Act. While the Respondent, in its answer and amended answer to the complaint, admits that Boston is a supervisor within the meaning of Section 2(11), it claimed to have insufficient information upon which to admit or deny, and it therefore denied, the allegation of her agency status.

Section 2(13) of the Act states:

> In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The Board and the courts have long held that in determining whether a person acts as an agent of another, the Board applies the common-law principles of agency. *Dr. Rico Perez Products*, 353 NLRB 453, 463 (2008); *NLRB v. Longshoremen (ILWU) Local 10 (Pacific Maritime Assn.)*, 283 F.2d 558, 563 (9th Cir. 1960), enfd. as modified 123 NLRB 559 (1959). Under the common-law rules of agency, an agency relationship can be established by vesting an

agent with actual or apparent authority. Actual authority is "created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent takes action on the principal's behalf." *Restatement (Third) Of Agency, Section 3.01* "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Restatement (Third) of Agency, Section 2.03.*

The Board has held that the burden of proving any type of agency "rests with the party asserting that relationship." *Millard Processing Services*, 304 NLRB 770, 771 (1991), enfd. 2 F.3d 258 (8th Cir. 1993), cert. denied 510 U.S. 1092 (1994); See *Pan-Oston Co*., 336 NLRB 305, 306 (2001); see also *Sunset Line & Twine Co.*, 79 NLRB 1487, 1508 (1948).

Evelyn Boston testified that she is the sole owner of the Respondent and the only person authorized to sign documents on the Respondent's behalf, such as contracts for the purchase of paints and supplies, and bids for work. She also admitted that her actions and decisions bind the Respondent. The record therefore establishes that Boston is vested with actual and apparent authority on the Respondent's behalf, and I find that she is an agent of the Respondent within the meaning of Section 2(13) of the Act.

C. The Association's Status as a Multiemployer Bargaining Association

The complaint alleges that the Painting and Decorating Contractors of America, Chapter #2, affiliated with the Finishing Contractors of America (the Association) is an association composed of approximately 160 employers, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union. (GC Exh. 1(c).) The Respondent, asserting that it had insufficient information to admit or deny the allegation, denied the allegation regarding the Association and its purpose.

Daniel Wienstroer, the executive director of the Association, testified that the Association provides representation for all collective-bargaining matters, such as negotiating collective-bargaining agreements with unions, including the Union in this matter, for its 160-170 employer-members or contractors in the St. Louis area who are signatory to its contracts, and the predecessor contracts. He also testified that the Association provides business advice and industry education and training to its employer-members, and it utilizes member-wide mailings to inform its members about industry standards and training programs.

Contrary to the Respondent's denial, I find that the Association is an association composed of approximately 160 employers, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union.

D. The Respondent's Employees Constitute a Unit Appropriate for the Purposes of Collective-Bargaining Within the Meaning of Section 9(b) of the Act

The Respondent denied that the unit as described in the complaint is the appropriate unit for purposes of bargaining. I note, however, that the Respondent has failed to present any evidence pertaining to the appropriateness of the bargaining unit of employees. The Respondent was signatory to the 2005–2010 and 2010–2013 contracts, which state at section 5, "Union Recognition," that "[t]he Union is recognized as the exclusive collective bargaining agent for all journeymen painters, tapers and drywall finisher, paper and wall covering hangers, apprentices, pre-apprentices, summer help and working foremen employed by the Employer." (GC Exh. 6(a).) I find the description of the unit is accurately described in the complaint, with the addition of the statutory exclusions set forth in the Act, as:

> All journeymen painters, tapers and drywall finishers, paper and wall covering hangers, apprentices, pre-apprentices, summer help and working foremen employed by the Employer, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

The Respondent failed to object to the admission of the contracts into evidence and Boston admitted executing and abiding by the terms of the 2005–2010 and 2010–2013 contracts. The Respondent likewise failed to establish any genuine issue of material fact regarding the appropriateness of the recognized bargaining unit in the complaint.

It is well established that in regard to an employer's voluntary recognition of a union, Board law provides that the Board's obligation in assessing the appropriateness of the bargaining unit under Section 9(b) is limited to ". . . a determination that the agreed-upon unit is not inconsistent with the Act or contrary to Board policy." *Alpha Associates*, 344 NLRB 782, 784 (2005); *Central Washington Hospital*, 303 NLRB 404, 412–413 (1991). Where the parties have agreed to a bargaining unit which is not contrary to the Act or Board policy, such a unit is found to be appropriate under the Act, regardless of whether the Board would have certified such a unit ab initio. *Red Coats*, 328 NLRB 205, 207 (1999); *Alpha Associates*, supra at 784. The evidence in this case establishes that the parties agreed to the unit as described in the complaint, and there has been no evidence presented which would indicate the unit is contrary to the provisions or purposes of the Act. Accordingly, I find that the unit description set forth in the complaint is an appropriate bargaining unit.

III. ALLEGED UNFAIR LABOR PRACTICES

A. The facts

1. The Respondent voluntarily recognized the Union on April 13, 2009, as the 9(a) exclusive collective-bargaining representative of its employees and became signatory to the 2005–2010 collective-bargaining agreement between the Union and the multiemployer bargaining association

The Respondent's business began in 1999 as a nonunion contractor in the construction industry performing painting, dry wall, and taping work for residential and commercial

customers. Respondent' owner, Evelyn Boston, testified that the Respondent generally employs between 2 and 4 employees, depending on the size of the jobs.

Boston testified that in April 2009, when the Respondent started its first commercial project for a Bar Louie restaurant, the contractor it was performing the work for advised her that it was a "union job," and the Respondent would have to sign a contract "to be union." Boston contacted the Union and on April 11, 2009, and submitted a signed application to be recognized as a union painting or taping contractor. (GC Exh. 5). On April 13, 2009, she met with a union representative and she signed a Section 9(a) voluntary recognition agreement, which states:

> Boston & Associates, LLC ("the Employer") hereby recognizes Painters District Council #2 ("the Union") as the sole and exclusive bargaining agent, within the meaning of Section 9(a) of the National Labor Relations Act ("the Act"), of all full-time and regular part-time painters, drywall finishers, etc. employed on all present and future job sites within the jurisdiction of the Union. Such recognition is predicated on the Union's demand for such recognition pursuant to Section 9(a) of the Act, and on the Union's presentation of a clear showing that the majority of employees in the bargaining unit are members of the Union and desire the Union to act as their exclusive representative within the meaning of Section 9(a) of the Act. The Employer acknowledges that it has reviewed the Union's showing and agrees that it reflects the employee's desire to be represented by the Union under Section 9(a) of the Act. (GC Exh. 4).

On April 13, 2009, Boston also signed a collective-bargaining agreement between the Union and the Painting and Decorating Contractors of America, Chapter #2 affiliated with the Finishing Contractors of America (FCA), a multiemployer bargaining association (the Association) which was effective by its terms from September 1, 2005 to August 31, 2010 (the 2005–2010 contract). (GC Exh. 6(a) and 6(b).) The contract, which provides that the Respondent authorizes the Association to represent it with regard to collective bargaining, states:

> The Employer expressly agrees that the Painting and Decorating Contractors of America, Chapter #2 affiliated with the Finishing Contractors of America (FCA), (hereinafter referred to as "PDCA") will represent the Employer for all collective bargaining purposes during the term of this Agreement, specifically including any and all negotiations with the Union for any renewal or subsequent Agreements, unless the Employer serves timely and unequivocal notice otherwise in accordance with the provisions of applicable law. (GC Exh. 6(a) p. 3.)

Thus, the terms of the contract provide that the Association remains the bargaining representative for the Respondent until the Respondent gives timely notice to the Association of its desire to terminate the relationship.

The terms of the contract also clearly provide that the Respondent agrees to recognize the Union as the exclusive representative of the unit employees. The contract states at section 5, "Union Recognition," that "[t]he Union is recognized as the exclusive collective bargaining agent for all journeymen painters, tapers and drywall finisher, paper and wall covering hangers, apprentices, pre-apprentices, summer help and working foremen employed by the Employer."

(GC Exh. 6(a)). In section 45 ("Termination") of the 2005–2010 contract, the Agreement provides:

> This Agreement shall become effective September 1, 2005 and shall remain in full force and effect until midnight August 31, 2010, and shall automatically be renewed from year to year thereafter unless either or both parties hereto shall give the other notice in writing at least sixty (60) days prior to the original expiration date of the Agreement or the then next expiration date in any year thereafter, of a desire to terminate or modify this Agreement. (GC Exh. 6(a) and (b)).

Boston testified that she has employed 2 to 4 employees on average over the time period relevant to this case. Specifically, in April 2009, the Respondent employed Stanley Jackson, a former union apprentice and member. Jackson worked for the Respondent on the Bar Louie job and signed a union authorization card on December 22, 2009, rejoining the Union. (GC Exh. 16). The record reveals that the Respondent abided by the terms of the 2005–2010 contract, remitting union dues, and paying union wages and benefits.

2. Respondent became signatory to the 2010–2013 collective-bargaining agreement, performed work under that contract, and abided by the terms of that contract

Boston testified that the only job the Respondent performed prior to the expiration of the 2005-2010 contract was the Bar Louie job. She testified that in the summer of 2010, she decided she did not want to be part of the Union's collective-bargaining agreement, but admittedly did nothing to terminate the contract. The 2005–2010 contract expired on August 31, 2010. Since the Respondent did not provide notice to the Union expressing its desire to terminate the agreement, the contract rolled over into the successor agreement, which was effective from September 1, 2010 to August 31, 2013 (the 2010–2013 contract). In addition, the Respondent did not give notice to the Association withdrawing its bargaining rights pursuant to the language of the contact, and the Association's bargaining rights rolled over into the 2010–2013 contract. The Respondent, however, did not sign the 2010–2013 contract at that time.

In December 2010, the Respondent started work on the Bellefontaine Rehabilitation Center job that lasted 4 to 6 months, and was valued at $70,000. From September 2011 through the end of 2012, the Respondent contracted to work a prevailing wage job at the Hamilton Apartments, which was valued at $300,000. Harris testified that since he was assigned to monitor union jobs throughout the city of St. Louis, he observed the work being performed on the Hamilton Apartment job. It was on that job that he noticed union members Stanley Jackson, Zachary Westover, and Wallace Hull performing work on that job for the Respondent. Harris testified that his discovering that the Respondent was employing workers on that job resulted in the Union contacting Boston for a meeting.

On or about October 11, 2011, the Union met with Boston regarding the 2010–2013 contract and the fact that she had failed to remit union dues for her employees. Boston testified that she was accompanied by a local contractor named J.L. Brown, who attended the meeting to support her, and that she told the union representatives at that meeting that she did not believe she was under any obligation to the Union at that time since the 2005–2010 contract had expired. Boston testified that the union representative advised her that since she did not give notice to the

Union of her intent to terminate the contract 60 days prior to the contract's expiration, the Respondent's obligation to be bound by its terms rolled over into the next contract. Boston acknowledged that she did not give the notice required by the termination clause of the contract, which was shown to her at the meeting. Boston then signed the 2010–2013 contract on October 11, 2011. (GC Exh. 7(a) and 7(b).) Boston also discussed with the Union the requirement that the Respondent be bonded under the contract's requirements. When she explained that she was having some difficulty obtaining a bond, the union representatives agreed to assist her in getting a bond.

Like the 2005–2010 collective-bargaining agreement, the terms of the 2010–2013 collective-bargaining agreement also contained very clear recognition language providing that the Respondent agrees to recognize the Union as the exclusive representative of the unit employees.[6] During the time of the 2010–2013 contract, the Respondent abided by its terms. The Respondent employed two painters (Jackson and Westover) on a Hyde Park South Apartment job in December 2012, which was a 3-month job worth $39,000. The Respondent paid the employees union wages and made contractually-required contributions to the Union's fringe benefit funds. However, on April 22, 2013, the Respondent provided the Union with written notice of its intent to terminate the 2010–2013 contact upon its expiration on August 31, 2013. (GC Exh. 8.) The Respondent filed hour contribution reports for the employees through the end of the contract, but it reported zero hours worked. It is undisputed that the Respondent did not give notice to the Association or the Union of intent to terminate the Association's authority to bargain on the Respondent's behalf.

In the summer of 2013, Boston called the Union and asked to speak with Union Representative Richard Lucks, who was unavailable. Union Representative David Doerr testified that he answered the phone when Boston called, and that Boston told him she was "no longer Union." Doerr testified that he asked Boston if she gave notice terminating the agreement, and Boston told him that she had given the Union notice in April 2013. Doerr testified that he told Boston that if she was no longer bargaining with the Union, she still had obligations under Section 9(a) of the contract. Boston then said she would call to speak to Lucks, but Boston admitted that she did not attempt to call the Union again.

Contrary to Doerr's testimony, Boston testified that in July 2013, she called the Union and spoke to Harris about whether the Union received her April 22, 2013 notice to terminate the 2010–2013 contract. Boston asserted that Harris admitted receipt of the notice and she then asked Harris if there was anything further that she needed to do to terminate the relationship. She testified that Harris said he was not sure and he would get back to her. Boston testified that a few days later, Harris returned her call and conferenced Doerr on the call, and in that call Doerr asked Boston if she would meet with the Union, and he asked why she would not consider staying in the Union. Boston testified that she told Doerr and Harris that she did not feel the Union benefited her or her employees, and that Doerr and Harris told her they would get back to her, but they never did. Boston did admit that neither Doerr nor Harris informed her she had

[6] The 2010–2013 collective-bargaining agreement states at sec. 5 ("Union Recognition") that "[t]he Union is recognized as the exclusive collective bargaining agent for all journeymen painters, tapers and drywall finisher, paper and wall covering hangers, apprentices, pre-apprentices, summer help and working foremen employed by the Employer." (GC Exh. 7(a).)

done everything necessary to terminate the bargaining relationship, rather, they simply said they would look into it. Boston testified that she assumed this meant she did not need to do anything further with regard to terminating the relationship. Harris denied participating in any conversations with Boston during the summer of 2013.

3. Effective August 31, 2013, upon the expiration of the 2010–2013 contract, the Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit employees and, effective September 17, 2013, it failed to comply with the terms and conditions of the 2013–2016 contract

On June 24, 2013, the Association was notified by the Union of its intent to begin bargaining for a new contract. (GC Exh. 11.) The Union sent a notice to its members who had hours reported on their behalf by signatory contractors (which would have included Jackson) notifying them that contract negotiations were to start and it sought the members' input. Wienstroer testified that it was the Association's practice to mail literature and other educational information related to the industry to its contractor-members who were signatory to the prior contract, including the Respondent. On August 16, 2013, the Association notified its signatory contractors that the Union had requested negotiations and the Association had agreed to bargain. A successor agreement effective by its terms from September 17, 2013 to August 31, 2016 (the 2013–2016) was executed. (GC Exh. 14.)

The Respondent admits in its answer and amended answer that effective August 31, 2013, it withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit employees. (GC Exh. 1(c).) It is undisputed that the Respondent thereafter failed to honor or abide by the terms and conditions of the 2013–2016 contract.

In October 2013, Harris was at the St. Louis City Police Headquarters renovation project, which was a union job. In speaking to the general contractor, Harris found out that Respondent was the painting contractor on the job. Boston testified that the Police Headquarters job was valued at $167,000. Harris testified that saw Respondent employees Jackson and Joshua Perry working on that job. Harris testified that when he discovered that Respondent was working on the police headquarters project, Harris reported that to the union officials. On November 14, 2013, the Union notified the Respondent that despite Boston's April 22, 2013 notice that she did not wish to continue her relationship with the Union, she was obligated to bargain with the Union because of their 9(a) relationship, and they suggested dates for a meeting with the Union. (GC Exh. 10.) Boston denied ever receiving that letter and never contacted the Union.

Harris testified that on December 9, 2013, he telephoned Boston and informed her that she was obligated to bargain with the Union, and Boston told him she had no obligations to the Union since she had given her notice of termination more than 60 days prior to the contract's expiration. Harris testified that Boston told him she wanted to get out of the Union because the Union was too expensive and she did not have any work. (GC Exh. 9.) Boston admitted that at no time had she informed the Union that her employees told her they no longer wished to be represented by the Union.

The record reveals that the Respondent was scheduled to complete the St. Louis City police headquarters project, valued at $167,000, in late June 2014. The Respondent had four

employees on that job and it was paying prevailing wage rate as well as the fringe benefit amounts directly to the employees.

During the 4-year period when the Respondent was signatory to the two collective-bargaining agreements, there were no representation petitions or unfair labor practice charges filed challenging the Union's majority status. It is undisputed that prior to withdrawing recognition from the Union on August 31, 2013, the Respondent never objected to or challenged the Union's showing of majority support in the unit, nor did it object to the recognition language in the voluntary recognition agreement or in the two collective-bargaining agreements. In addition, the record is devoid of any evidence constituting an affirmative showing that the Union lost majority support of the bargaining unit employees.

B. The credibility determinations

While many of the facts in this case are undisputed, there are occasions where the testimony of the Respondent's witnesses conflicts with the testimony of the General Counsel's witnesses. As the finder of fact, I must determine the credibility of these witnesses. Credibility determinations may rely on a variety of factors, including the content of the witness' testimony, the witness' demeanor, the weight of the evidence, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations. *Double D Construction/ Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions. Indeed, nothing is more common than for a judge to believe some, but not all, of the testimony of a witness. *Daikichi Sushi*, 335 NLRB at 622; *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). Accord: *General Fabrications Corp.*, 328 NLRB 1114 fn. 1 (1999), enfd. 222 F.3d 218 (6th Cir. 2000). See also *J. Shaw Associates*, *LLC*, 349 NLRB 939, 939–940 (2007).

My overall observation during the trial was that the General Counsel's witnesses were largely credible in their testimony and demeanor, and that they testified in a convincing and straight forward manner indicative of truthfulness. On the other hand, the Respondent's two witnesses, Evelyn Boston and Stanley Jackson, testified in a less convincing manner and at times presented inconsistent, vague, and implausible testimony. They also presented testimony that frequently appeared to be less than forthright, and that at times appeared to be self-serving and misleading. For example, Jackson, whose demeanor at the trial was evasive and angry, signed union authorization cards in December 2009 and September 2012 to join the Union. However, he vaguely testified that he was somehow forced to join the Union, but then admitted that he had a choice in joining the Union or working elsewhere. I found Jackson's testimony unconvincing and his assertions incredible. It strains credulity to believe that he was forced to join the Union when he did not want to, and he then joined the Union not once, but twice. I find it implausible that if he was forced to join the Union in 2009 against his desires to do so, he would sign an authorization card and join the Union a second time in 2012.

Boston's testimony was equally unconvincing and incredible. Her responses to questions revealed vague recollections about meetings and she sometimes required the aide of documents to refresh her recollection about events. Boston's testimony was also inconsistent at times. While she testified that she met only once with the union representatives on November 9, 2011, to sign the 2010–2013 contract, the record shows that she also signed the contract on October 11, 2011 (GC Exh. 7(b)), revealing that she actually met with the Union on two occasions. In addition, Boston testified that when she met with the union representatives on November 9, 2011, it was only her, inferring that she was alone when she met with the group of union representatives. However, when specifically asked on cross-examination, she admitted that another contractor attended the meeting with her as a source of support.

I found Boston's testimony was particularly vague, self serving, and implausible with regard to her execution of the voluntary recognition agreement on April 13, 2009. While she testified that she was never presented with evidence of majority support by the Union, she signed the agreement attesting that she had, in fact, been shown majority support. Boston also admitted on cross-examination that she never objected to the Union about allegedly not being shown evidence of majority support. I find it implausible that she would fail to register an objection with the Union at some time within the 4-year period between April 2009 and 2013, if the Union had in fact failed to present a majority showing to her. In addition, while Boston testified that she did not have any employees working on the Bar Louie Restaurant job until December 2009, she neglected to indicate she was working on other jobs in April 2009, and Jackson admitted that while he did not start the Bar Louie job until December 2009, he was employed by the Respondent in April 2009.

At the hearing, Boston testified that she wanted out of the Union because she allegedly did not have enough work when she was a union contractor, she could not get bonded, and Jackson did not want to be part of the Union. (Tr. 140.). I found Boston's testimony in this regard to be particularly troubling and incredible. Her assertion that Jackson did not want to be part of the Union is belied by the fact that he signed several union authorization cards to be in the Union. While Boston testified that she has employed between two and four employees over the time period in question (such as Westover and Wallace Hull, in addition to Jackson), the Respondent failed to present any credible evidence of other employees' desires regarding union representation. In addition, despite her assertion that her employees did not want to be union, she admitted on cross-examination that she had several meetings with the Union, but neglected to ever inform the union representatives that her employee or employees did not want to be in the Union. Furthermore, in her April 22, 2013 letter to the Union in which she sets forth her reasons for not wanting to renew the contract with the Union, she neglected to mention the alleged reason set forth at trial that her employees did not support or want to be in the Union. (GC Exh. 8.)

With regard to Boston's assertions that the Respondent had very little, and not enough work after it became a union contractor, her testimony on direct-examination only referenced the Bar Louie Restaurant job in 2009, the Hamilton Apartment job in 2011, and the St. Louis City Police Headquarters job in 2013. I find this self-serving testimony was Boston's attempt to convey or imply that Respondent was disadvantaged by becoming a union contractor and that she had very few employees, which she believed would support her contention that the Union failed to make a sufficient showing of majority support when it demanded 9(a) recognition. On

cross-examination, however, she admitted to other jobs she failed to mention on direct examination. For example, she admitted that on December 17, 2012, the Respondent started working on a large project for the Hyde Park South Apartments, valued at $39,000, where she had two employees, Jackson and Westover, employed on that project. (Tr. 146.) She also admitted that in December 2010, she served as a union contractor at the Bellefontaine Rehabilitation Center, a 4 to 6 month job where Respondent was paid $70,000, and employed three employees—Jackson, Westover, and Hull. (Tr. 146.) I find that since Boston admitted to working more jobs on cross-examination than she originally testified to on direct-examination, her credibility was further undermined, and it is possible there were other jobs that she failed to testify about. Respondent's jobs worked during the time period in question could have been established by the Respondent's production of its records pertaining to the jobs performed and the amount of work done, which were clearly in its control but never produced at trial.

Therefore, based on the above, I credit the testimony of the General Counsel's witnesses where they conflicted with the testimony of the Respondent's witnesses.

C. The Contentions of the Parties

The General Counsel alleges that the Respondent withdrew recognition from the Union as the exclusive collective-bargaining representative of the unit employees as of August 31, 2013, and failed and refused to abide by the successor collective-bargaining agreement negotiated by the Association, which is effective by its terms from September 17, 2013 through August 31, 2016.

The Respondent denies that a 9(a) bargaining relationship with the Union was established, and claims that the 2001-2010 and 2010-2013 contracts between the Union and the Association are governed by Section 8(f) of the Act. The General Counsel asserts in response, that the clear language of the April 13, 2009 voluntary recognition agreement establishes a 9(a) relationship, and that any defense denying 9(a) status is barred by Section 10(b) of the Act. In addition, the General Counsel contends, regardless of whether the status of the collective-bargaining relationship is based on Section 9(a) or Section 8(f), Respondent failed to give timely notice to the Association revoking the Association's bargaining authority on Respondent's behalf. Therefore, the General Counsel asserts that the Respondent failed to give timely and unequivocal notice to the Union or the Association revoking the Association's authority to bargain on its behalf with the Union, and violated the Act by withdrawing recognition from the Union and failing to adhere to the 2013—2016 collective-bargaining agreement.

D. Analysis

1. The Respondent voluntarily recognized the Union as the 9(a) exclusive collective-bargaining representative of its unit employees, but the Respondent contends it had an 8(f) relationship

The complaint alleges that the Respondent recognized the Union as the exclusive collective-bargaining representative of the appropriate bargaining unit described in the 2005–

2010 and 2010–2013 multiemployer collective-bargaining agreements between the Union and the Association, by virtue of the voluntary recognition agreement dated April 13, 2009. In its answer, the Respondent denies these allegations, and despite the undisputed evidence that it executed the voluntary recognition agreement, the Respondent argues that it does not have a 9(a) relationship, but instead contends that an 8(f) relationship exists.

The Board held in *John Deklewa & Sons*, 282 NLRB 1375, 1385 (1987), enfd. sub nom. *Iron Workers v. NLRB*, 843 F.2d 770 (3d Cir.), cert. denied 488 U.S. 889 (1988), that there is a rebuttable presumption that bargaining relationships in the construction industry are established under Section 8(f) of the Act, and it placed the burden of proving that such relationships under Section 9(a) of the Act on the party asserting the 9(a) status. Id. at 1385, fn. 41. Thus, the General Counsel in this case bears the burden of proving a 9(a) relationship exists between the Respondent and the Union.

Section 8(f) of the Act permits unions and employers in the construction industry to enter into collective-bargaining agreements without establishing that the union has the support of a majority of the unit employees.[7] An exception is therefore created to the general rule under Section 9(a) that a showing of majority support is required for a bargaining representative.[8] The significance between a union's representative status under Section 8(f) and Section 9(a) is that an 8(f) relationship may be terminated by either party on the expiration of their collective-bargaining agreement. *Deklewa*, supra at 1386–1387. A 9(a) relationship, in contrast, continues after expiration of the contract, unless and until the union is shown to have lost majority support. *Levitz Furniture Co*., 333 NLRB 717 (2001). The Board has held in cases after *Deklewa*, that a union in the construction industry can overcome the presumption of 8(f) status by showing that it made an unequivocal demand for, and that the employer unequivocally granted majority recognition, based on a showing of majority support in that bargaining unit. *Western Pipeline, Inc.*, 328 NLRB 925 (1999).

Since *Deklewa*, the Board has set forth the minimum requirements for written recognition agreements that establish union recognition as a 9(a) representative solely on the basis of such an agreement, without requiring the use of extrinsic evidence. In *Staunton Fuel & Material, Inc., d/b/a Central Illinois Construction*, 335 NLRB 717 (2001), the Board, in adopting the test articulated by the Tenth Circuit Court of Appeals in *NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147, 1155–1156 (2000) and *NLRB v. Oklahoma Installation Co.*, 219 F.3d 1160, 1164—1166 (2000), held that "a written agreement will establish a 9(a) relationship if its language unequivocally indicates that the union requested recognition as majority representative, the

[7] Sec. 8(f) provides, in pertinent part: "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members. . . . because (1) the majority status of such labor organization has not been established under the provisions of Sec. 9 of this Act prior to the making of such agreement. . . . Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to Sec. 9(c) or 9(e)."

[8] An exception is also created in Sec. 8(f) to the general rule of Sec. 8(a)(2) and Sec. 8(b)(1)(A) that an employer and a union lacking majority support of the unit employees may not enter into a bargaining relationship with respect to those employees. *Staunton Fuel & Material*, 335 NLRB at 718.

employer recognized the union as majority representative, and the employer's recognition was based on the union's having shown, or having offered to show, an evidentiary basis of its majority support." Id. at 717, 719–720. In *Staunton Fuel & Material*, the Board, in an effort to provide further guidance, held that "…the union's required request for recognition can be fairly implied from the contract language stating that the employer grants the required recognition," and ". . . the employer's grant of recognition must be express and unconditional." Id. at 720.

As mentioned above, the Respondent in the instant case signed a 9(a) voluntary recognition agreement on April 13, 2009, which states:

> Boston & Associates, LLC ("the Employer") hereby recognizes Painters District Council #2 ("the Union") as the sole and exclusive bargaining agent, within the meaning of Section 9(a) of the National Labor Relations Act ("the Act"), of all full-time and regular part-time painters, drywall finishers, etc. employed on all present and future job sites within the jurisdiction of the Union. Such recognition is predicated on the Union's demand for such recognition pursuant to Section 9(a) of the Act, and on the Union's presentation of a clear showing that the majority of employees in the bargaining unit are members of the Union and desire the Union to act as their exclusive representative within the meaning of Section 9(a) of the Act. The Employer acknowledges that it has reviewed the Union's showing and agrees that it reflects the employee's desire to be represented by the Union under Section 9(a) of the Act. (GC Exh. 4).

In addition, the 2005–2010 and 2010–2013 contracts, which were both executed by the Respondent, provide that the Respondent agreed to recognize the Union as the exclusive representative of the unit employees. (GC Exh. 6(a) and 7(a).)

In analyzing the language of the voluntary recognition agreement and the collective-bargaining agreements under the established Board law, I find that the clear and unequivocal recognition language satisfies the criteria set forth in *Staunton Fuel & Material* to establish a 9(a) relationship. In particular, the language of the voluntary recognition agreement clearly sets forth that the Union's demand for recognition is pursuant to Section 9(a) of the Act, the agreement provides that Respondent recognizes the Union "as the sole and exclusive bargaining agent within the meaning of Section 9(a) of the Act," and it states that the recognition was based on the Union's having shown an evidentiary basis for majority support. I note that the instant recognition agreement not only meets the Board's requirements articulated in *Staunton Fuel & Material*, it actually contains the added unequivocal assurance that the Respondent not only reviewed the showing, but also agreed that it reflected the employees' desire to have the Union represent them. The Respondent's grant of recognition in this case was unequivocal, express, and unconditional. Accordingly, I find that the General Counsel satisfied the burden of proving that the Union is the exclusive collective-bargaining representative of Respondent's unit employees pursuant to Section 9(a) of the Act.

2. The Respondent's defense challenging the 9(a) relationship is time-barred

The Respondent, more than 4 years after attesting in the voluntary recognition agreement that it was shown the Union's majority support, it reviewed the support, and it agreed the support

reflected the employees' desire to be represented by the Union, now asserts as a defense that it had no employees at the time it executed that agreement, and that no showing of majority support had been offered by the Union. In addition, the Respondent challenges the validity of the voluntary recognition agreement after being signatory to two collective-bargaining agreements containing union recognition language (the 2005–2010 and 2010–2013 contracts), and after it presumably enjoyed the financial benefits of securing contracts for union work projects during the duration of those contracts.

The Respondent failed to produce any evidence which would indicate the parties had only an 8(f) relationship, or any evidence that contradicts the clear and unambiguous language of the voluntary recognition agreement and the two collective-bargaining agreements it complied with over that 4-year time period. Instead, in support of its asserted defense, the Respondent relies on Boston's testimony that over 4 years ago the union business agent who gave her the voluntary recognition agreement and the 2005–2010 contract to sign, allegedly failed to present her with a showing of majority status, on Jackson's testimony that he allegedly did not support the Union, and on the fact that the General Counsel failed to present any evidence showing that the asserted showing of majority support was true.[9] Before considering this defense, I must first determine whether it is time-barred under Board law.

It has long been held that Section 10(b) of the Act precludes challenges to the lawfulness of recognition granted under Section 9(a) of the Act outside the 6-month 10(b) period. *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960). The Board's decision to prohibit unreasonably timed challenges to majority status at the time of recognition is established law outside the construction industry. In situations where a union requests recognition under Section 9(a) from a nonconstruction employer, that employer may demand a showing of majority support or accept the union's claim on its face and recognize the union. *Central Illinois*, supra at 719, fn. 10; *Oklahoma Installation*, 325 NLRB 741, 742 (1998); *Glaziers and Glassworkers, Local 767*, 228 NLRB 35, 40–41 (1977), enfd. 577 F.2d 100 (9th Cir. 1978). If an employer recognizes the union, but subsequently discovers the union actually lacked majority support, the union's 9(a) status may be challenged at any time with in the 6-month limitation period after wrongfully extending recognition, pursuant to Section 10(b) of the Act. *Oklahoma Installation*, supra at 742. If an employer fails to challenge within the 10(b) period, it may terminate its obligation to bargain only by showing that the union has actually lost majority support, the burden of which rests on the employer. *Levitz Furniture Co.*, 333 NLRB 717 (2001).

In *Casale Industries, Inc*., 311 NLRB 951 (1993), the Board addressed the issue of timing for employer challenges to the validity of Section 9(a) relationships in the construction industry. In that case, the Board considered whether the collective-bargaining agreement between an multiemployer association and the union covering a multiemployer bargaining unit was entered into pursuant to Sections 9(a) or 8(f). The Board found that the contract was entered into pursuant to Section 9(a), and the petitions seeking single-employer units were not filed within a reasonable time after the association extended 9(a) recognition to the union. Therefore, the

[9] In its brief, the Respondent argues that since Union Business Manager Gregg Smith testified that he did not have any knowledge of the Respondent's employees in 2009, or details about the showing of interest at that time, the General Counsel failed to present evidence that the assertions of majority status in the voluntary recognition agreement were true. (Resp. Br. pp. 2–3).

petitioned-for units were not appropriate because they were not coextensive with the recognized multiemployer bargaining unit. Id. In *Casale Industries*, the union and association entered into a written recognition agreement in 1982 based on the results of a private (non-NLRB) election. Since that time, the association and union had been parties to four successive collective-bargaining agreements, the third of which expired in August 1988. During the open period of the third contract, the union filed petitions seeking to represent separate units of employees. In September 1988, the association and union executed their fourth contract. Id. at 952.

The Board found in *Casale Industries* that the parties intended to establish a 9(a) relationship by virtue of their use of an election, but recognized that even where the parties intend a 9(a) relationship, that intention can be thwarted if the union did not have majority support at the time of recognition. Id. The Board found that if majority status is challenged within a reasonable time, and majority status is not shown, the relationship will not be a 9(a) relationship. Id. at 953. The Board found in that case that there was a "substantial question" as to whether majority status was shown. However, the challenge to majority status came 6 years after Section 9(a) recognition was extended and accepted, and the parties reached agreement on three successive contracts. Id. In that case, the Board noted that for nonconstruction industry cases, challenges to majority status at the time of recognition that are made after more than 6 months, will not be considered. Id., citing *Bryan Mfg. Co.*, 362 U.S. 411 (1960). The Board, noting that it found in *Deklewa* that unions in the construction industry should not be treated less favorably than those unions in the nonconstruction industry, reasoned that the 6 month time limitation should also apply to the construction industry. Therefore, in *Casale Industries*, the Board did not permit the challenge to 9(a) status, finding that challenges to majority status must be made within a reasonable period of time after 9(a) recognition is granted. In that regard, the Board held that "if a construction industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition, the Board should not entertain a claim that majority status was lacking at the time of recognition." Id.

Even though *Casale Industries* was a representation case, the Board has extended the rationale and holding of that case to unfair labor practice cases. *New Brunswick General Sheet Metal Works*, 326 NLRB 915, 919–920 (1998); *DiPonio Construction Co.*, 357 NLRB No. 99, slip op. at 8–9 (2011). In *New Brunswick*, supra, the Board was confronted with, inter alia, issues of whether a union established itself as the exclusive collective-bargaining representative pursuant to Section 9(a), and whether the Respondent violated Section 8(a)(5) by withdrawing recognition from the union. Id. In that case, the employer challenged the union's majority status after more than 6 years and several successive collective-bargaining agreements. In *New Brunswick*, the Board affirmed the administrative law judge's finding that the employer was time-barred from challenging the union's majority status, and it found that the union was the exclusive collective-bargaining representative pursuant to Section 9(a).[10] In addition, in *DiPonio Construction*, supra, the Board found that an employer's defense challenging a union's majority

[10] The Board also held in *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143, 144 (2007), that where an employer argued it was privileged to withdraw recognition from the union upon the expiration of their 1998 collective-bargaining agreement allegedly because the bargaining relationship was not initially based on a claim or showing in 1992, that argument is time-barred and the relationship was governed by Sec. 9(a). See *North Bros. Ford*, 220 NLRB 1021 (1975), citing *Machinists Local Lodge 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960) (Sec. 10(b) applies to a refusal-to-bargain defense that a bargaining relationship was unlawfully established).

status through the recognition language after 8 years had passed and the employer was signatory to three collective-bargaining agreements, was time-barred.

The Board's findings in *Casale Industries* and the cases discussed above are clearly applicable to the instant case. I find that the Respondent's challenge to 9(a) status after more than 4 years have passed, and after being signatory to, and abiding by, two collective-bargaining agreements, is well beyond the 6-month 10(b) period, and that defense is therefore time-barred. *DiPonio Construction Co., Inc.*, 357 NLRB No. 99, slip op. at 8–9 (2011); *Strand Theatre of Shreveport Corp.*, 346 NLRB 523, 536–537 (2006), enfd. 493 F.3d 515 (5th Cir. 2007). I note that my finding in this regard is consistent with the purposes and policies of the Act, as to find otherwise "would mean that longstanding relationships would be vulnerable to attack, and stability in labor relations would be undermined."[11]

3. Even assuming the Respondent's defense is not time-barred, it nevertheless lacks merit

I find that even assuming the Respondent's asserted challenge to the 9(a) relationship is not time-barred, it is without merit. The record contains clear and unequivocal contractual language granting the Union recognition. The Respondent has failed to present evidence of a lack of majority support for the Union at the time the voluntary recognition agreement was executed, such as business or payroll records identifying the employees employed at that time. Such evidence, which is within Respondent's control, presumably could have supported its assertion that it had no employees. I infer from Respondent's failure to produce documents in its control which were vital to prove its defense, that the records did not support the Respondent's position. *Seedoroff Masonry, Inc.*, 360 NLRB No. 107, at slip op. p. 1, fn. 1 (2014); *Galesburg Construction Co.*., 267 NLRB 551, 552 (1983).

In support of its defense, the Respondent relies instead on Boston's testimony that she was not presented with a showing of majority status, on Jackson's assertion that he did not support the Union, and on the General Counsel's failure to offer evidence to confirm the validity of the showing of support. As mentioned above, I do not credit Jackson or his assertion that he did not support the Union. I also do not find persuasive the assertion that the General Counsel's witness did not confirm the validity of the majority support, because evidence of the majority support is found in the clear and unequivocal language of the voluntary recognition agreement.

With regard to Boston's testimony, as mentioned above, I found her testimony unpersuasive. In addition, I find no merit to Respondent's asserted defense for a number of reasons. While Boston alleged she was never presented evidence of majority support, she signed the agreement attesting that she had been shown the Union's support, she acknowledged she reviewed the Union's showing, and she agreed it reflected the employees' desire to be represented by the Union. I find it implausible that Boston would sign such a document if in fact the statements in the document were untrue. In addition, Boston admitted on cross-examination that she never objected to the Union about allegedly not being shown evidence of majority support. I find it implausible that she would not have registered an objection with the Union if in fact no majority support had been presented. I also note that Boston never mentioned the Union's alleged failure to show majority support when she met with the Union and conveyed the

[11] *Casale Industries*, supra at 953, citing *Bryan Mfg. Co.*, supra at 429.

reasons she did not want to be union, and she likewise neglected to mention that fact in her letter to the Union dated April 22, 2013, wherein she informed the Union of her reasons for no longer wanting to be a union contractor.

I find that the record contains other evidence which belies the Respondent's assertion that the Union's majority support was lacking or never presented. Smith credibly testified that it is the Union's practice to present a showing of majority support when requesting voluntary recognition from a contractor. Furthermore, while Boston testified that she did not have any employees working on the Bar Louie restaurant job until December 2009, she neglected to indicate she had on other jobs in April 2009, and Jackson admitted that he was employed by the Respondent in April 2009. Finally, Boston's testimony that she did not have any employees is contradicted by her testimony that from 2009 to the present, she had consistently employed between 2 and 4 employees. Thus, I find that the Respondent's asserted defense, besides being time-barred, lacks merit and is not supported by the record evidence.

4. The Respondent's reliance on *Nova Plumbing* is misplaced

In its brief, the Respondent relies on the D.C. Circuit Court's decision in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d. 531 (D.C. Cir. 2003), denying enf. 336 NLRB 633 (2001), in support of its assertion that its relationship with the Union was not based on Section 9(a) of the Act. In *Nova Plumbing*, the Board applied the *Staunton Fuel & Material* test and found that a 9(a) relationship was created by virtue of the contractual language. The D.C. Circuit Court, however, declined to enforce the Board's order where there was unrebutted evidence which contradicted the contractual assertions. *Nova Plumbing, Inc.*, 336 NLRB 633 (2001), enf. denied 330 F.3d 531 (D.C. Cir. 2003). In that case, the court specifically relied on evidence that the employees emphatically expressed their opposition to union representation at the time the employer recognized the union. *Nova Plumbing*, 330 F.3d at 537. On that basis, the court determined that the presumption of 8(f) recognition had not been overcome. The court explained that the language of the contract and the intent are legitimate factors for determination of the nature of a bargaining relationship in the construction industry, but "[s]tanding alone,. . .[they] cannot be dispositive, at least where . . . the record contains strong indications that the parties had only a section 8(f) relationship." Id.

Regarding the Respondent's reliance on *Nova Plumbing*, with all due respect to the court of appeals for the D.C. Circuit, I am obligated to follow Board precedent unless and until it is reversed by the Supreme Court. *Waco, Inc*., 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981); and *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), enfd. in part 331 F.2d 176 (8th Cir. 1964). Accordingly, I will apply the extant Board law and principles expressed in *Staunton Fuel & Material*, supra, to find that the Respondent and the Union had a 9(a) relationship.

Notwithstanding the fact that I am not bound by the court of appeal's decision in *Nova Plumbing*, I nevertheless find that the Respondent's reliance on that case is misplaced as it is clearly distinguishable from the instant case. In *Nova Plumbing*, the contract incorporated a recognition clause that did not specifically mention an intent to create a 9(a) relationship. However, the language of the voluntary recognition agreement in the present case specifically refers to Section 9(a) on four occasions, leaving little, if any, doubt that the parties intended a

9(a) relationship. In addition, in *Nova Plumbing* there was substantial evidence concerning the bargaining relationship between the employer and the union, as well as the fact that the court relied on evidence that when the employer voluntarily recognized the union, the employees emphatically expressed their opposition to the employer recognizing the union. *Nova Plumbing*, supra at 537. In the present case, no such evidence exists. Instead, the Respondent relies on Boston's self-serving and unsupported assertion that she had no employees, which I have specifically discredited, and on Jackson's assertion more than 4 years later that he did not support the Union when recognition was granted, which I have also discredited and found unreliable. Thus, *Nova Plumbing* is distinguishable from the instant case, and I find that Respondent's reliance on that case is misplaced.

I therefore find the record establishes that majority support existed for the Union when the Respondent executed the voluntary recognition agreement and the collective-bargaining agreements, and that the Respondent recognized the Union as the exclusive collective-bargaining representative of the Respondent's unit employees under Section 9(a) of the Act. In addition, I find that the Respondent failed to produce any evidence showing that the Union had, at any time, lost its majority support in the unit. *Levitz Furniture Co.*, supra at 8.

5. The Respondent was signatory to the contracts that required notice to the Association of its intent to revoke the Association's bargaining authority on the behalf of the Respondent

The Respondent's answer and amended answer admitted the complaint allegations that it was signatory to the 2005–2010 and 2010–2013 collective-bargaining agreements between the Union and the Association, that those contracts authorized the Association to bargain on Respondent's behalf with the Union, including negotiations for any renewal or subsequent agreements, and that Respondent's authorization of the Association to bargain subsequent agreements continued unless Respondent provided timely and unequivocal notice revoking the Association's authority. (GC Exh. 1(c), (e), and (i).) In that regard, the 2010–2013 contract specifically provides at page 3:

> The Employer expressly agrees that the Painting and Decorating Contractors of America, Chapter #2 affiliated with the Finishing Contractors of America (FCA), (hereinafter referred to as "PDCA") will represent the Employer for all collective bargaining purposes during the term of this Agreement, specifically including any and all negotiations with the Union for any renewal or subsequent Agreements, unless the Employer serves timely and unequivocal notice otherwise in accordance with the provisions of applicable law. (GC Exh. 7(a) p. 3.)

On this issue, Wienstroer's undisputed testimony also confirmed that the Association is authorized by the contractors to bargain with the Union on their behalf, and those bargaining rights roll over to the successor agreements unless the employers withdraw their bargaining rights from the Association by written, timely, and unequivocal notice to the Association.

6. The Respondent failed to give timely and unequivocal notice revoking the Association's bargaining authority.

The Respondent does not dispute that it signed the 2010–2013 contract, but it denied the complaint allegation that it failed to give timely and unequivocal notice to the Union or the Association revoking the Association's authority to bargain collectively on the Respondent's behalf with the Union. Wienstroer credibly testified that the Respondent is a member of the Association pursuant to its execution of the 2005–2010 and 2010–2013 contracts, and it failed to give notice, timely or otherwise, to the Association withdrawing those bargaining rights. Despite the Respondent's assertion that it provided the Association notice, the record is devoid of any evidence that establishes the Respondent provided the Association or the Union with "timely and unequivocal notice" that it was revoking the Association's authority to bargain on its behalf, as required by the contract.

In its brief, the Respondent's asserts that its April 22, 2013 letter notifying the Union that it would not be "renewing a bargaining agreement" constitutes notice to the Association required under the contract. The Respondent argues that the 2010–2013 contact was an 8(f) agreement and it thereby terminated the 8(f) bargaining relationship with timely notice to the Union.

As mentioned above, I find that the bargaining relationship was pursuant to Section 9(a) of the Act, not 8(f). However, even assuming that the parties maintained an 8(f) relationship, and the Respondent's April 22, 2013 notice was sufficient to notify the Union of its intent to terminate the contract, it is nevertheless undisputed that the contracts at issue require the Respondent to also provide the Association notice of its intent to revoke the Association's authority to bargain on the Respondent's behalf. As set forth above, that language clearly provides that the Association will represent the Respondent for all collective-bargaining purposes "specifically including any and all negotiations with the Union for any renewal or subsequent Agreements, unless the [Respondent] serves timely and unequivocal notice otherwise in accordance with the provisions of applicable law." (GC Exh. 6(a) and 7(a).) The Respondent's theory is therefore flawed, as it neglects to grasp the distinction between a notice informing the Union of its intent to terminate the contract under section 44 "Termination" of the contract, and notice to the Association of its intent to revoke the Association's authority to bargain on Respondent's behalf. The Board has specifically held that ". . . an employer's withdrawal of negotiating authority from a multiemployer association is an action distinct from terminating a contract. *Rome Electrical Systems, Inc*., 349 NLRB 745, 747 (2007), enfd. 286 Fed. Appx. 697 (11th Cir. 2008); See, e.g., *Kirkpatrick Electric*, 314 NLRB 1047, 1049–-1052 (1994); *Leapley Co*., 278 NLRB 981, 982–984 (1986).

The Board has held that an employer in the construction industry may become bound to successive 8(f) as well as 9(a) contracts if the employer expressly provides continuing consent to a multiemployer association to bind it to future contacts, and the employer has not taken timely or effective action consistent with its own agreement, to withdraw that continuing consent from the association. *Seedorff Masonry, Inc.*, 360 NRLB No. 107, at slip op. 6 (2014), citing *Haas Electric, Inc*., 334 NLRB 865, 866 fn. 7 (2001), enf. denied on other grounds 299 F.3d 23 (1st Cir. 2002); *James Luterbach Construction Co*., 315 NLRB 976, 781 fn. 11 (1994); *Kephart Plumbing*, 285 NLRB 612 (1987); *Reliable Electric Co.*, 286 NLRB 834 (1987).

In analyzing this issue, I find that the Board's decisions in *Haas Electric*, supra, and *Seedorff Masonry*, supra, are on point with the instant case. In *Haas Electric*, the respondent employer signed a letter of assent binding it to the contract, and authorizing the multiemployer association with bargaining authority, unless and until that authority was terminated in accordance with pre-prescribed procedures. Id. The respondent sent a letter to the union and association announcing its intent to terminate the agreement with the union and withdraw recognition. Id. at 867. Like the instant case, the respondent claimed its letter constituted timely revocation of the association's authority to bargain on its behalf. The Board disagreed, finding that the letter only purported to terminate the contract and to withdraw recognition from the union; the letter said nothing about revoking the association's authority to negotiate on the respondent's behalf. Id. The Board held that the respondent did not timely revoke the association's authority, and the respondent was bound by the contract extension that the association negotiated on its behalf. On that basis, the Board found that the respondent violated Section 8(a)(5) and (1) of the Act when it abrogated the contract, made unilateral changes to working conditions, and withdrew recognition from the union. Id.

In *Seedorff Masonry*, the Board found that the respondent violated Section 8(a)(5) and (1) of the Act by refusing to abide by the terms of the 2010–2014 contract between the multiemployer association and the union. Id. Similar to the instant case, the respondent in *Seedorff Masonry* signed an agreement (an individual building agreement) which expressly gave continuing consent to the association to bind it to successive collective-bargaining agreements, and the respondent never revoked that authorization. Id. The Board found the respondent was obligated to abide by the provisions of the contract, and its failure to do so violated the Act.

In the instant case, as in *Haas Electric* and *Seedorff Masonry*, the 2010–2013 contract expressly provides for continuing authority to the Association to bargain on Respondent's behalf for any renewal or subsequent agreements, unless Respondent provides timely and unequivocal notice revoking the Association's authority to bargain. While Boston testified that she was aware that she joined the Association, she was subject to the collective-bargaining agreements, and she had an agreement with the Association to represent her and bargain with the Union on her behalf,[12] she also admitted at the hearing that she did not provide notice to the Association rescinding the Association's right and authority to bargain on Respondent's behalf.[13] Based on the well established case law, I find that the Respondent's notice to the Union of its desire to terminate the contract in its April 22, 2013 letter did not constitute notice to the Union or the Association of the Respondent's desire to revoke the Association's authority to bargain on the Respondent's behalf. In accordance with the 2010–2013 contract language, since the Respondent did not provide timely and unequivocal notice to the Association, the Association retained the authority to bargain for and bind the Respondent to the successor agreement which is effective by its terms from September 17, 2013 through August 31, 2016 (2013–2016 contract). *Rome Electric Systems*, supra at 747; *Seedorff Masonry*; *Haas Electric*, supra. Despite the fact that this finding is premised on my determination that the Union is the exclusive 9(a) representative of the Respondent's unit employees, I note that I would reach the same conclusion if the parties' relationship was established pursuant to Section 8(f) of the Act.

[12] Tr. 131–132.
[13] Tr. 142–143.

7. The Association and the Union executed a successor agreement effective September 17, 2013 through August 31, 2016 (2013–2016 contract), and the Respondent withdrew recognition from the Union and failed to abide by the terms of the 2013–2016 contract, thereby violating Section 8(a)(5) and (1) of the Act

The complaint alleges that the Union and the Association negotiated and executed a collective-bargaining on September 17, 2013, but the Respondent denied that allegation in its answer and amended answer. However, Wienstroer and Smith both credibly testified that the 2013–2016 contract was executed by the Union and Association, and it was identified and admitted into evidence without objection from the Respondent. The Respondent also failed to offer any evidence to rebut the execution of the 2013–2016 contract. Accordingly, I find that the successor 2013–2016 contract was negotiated and executed by the Union and the Association.

The Respondent admitted in its answer and amended answer that effective August 31, 2013, it withdrew its recognition from the Union as the exclusive collective-bargaining representative of its unit employees. The Respondent also admitted it refused to adhere to the 2013–2016 collective-bargaining agreement, which became effective September 17, 2013.

As mentioned above, I find that the Respondent's relationship with the Union was pursuant to Section 9(a) of the Act. Under Section 9(a) the Respondent's associated obligation to bargain continued after the 2010–2013 contract expired, unless and until the Union is shown to have lost majority support, which in this case never happened. *Levitz Furniture Co.*, supra. I find that since the Respondent failed to provide timely written and unequivocal notice to the Association revoking the Association's authority to bargain on its behalf prior to the expiration of the 2010–2013 collective-bargaining agreement, the Respondent became bound by the terms of the 2013–2016 successor contract. Therefore, by its withdrawal of recognition from the Union effective August 31, 2013, and its subsequent failure to abide by the terms of the 2013–2016 collective-bargaining agreement which was effective September 17, 2013, between the Association and the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Union of Painters and Allied Trades, District Council #2 and its successor, the International Union of Painters and Allied Trades, District Council #58, are labor organizations within the meaning of Section 2(5) of the Act.

3. At all material times since April 13, 2009, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the following appropriate unit:

> All journeymen painters, tapers and drywall finishers, paper and wall covering hangers, apprentices, pre-apprentices, summer help and working foremen

employed by the Employer, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

4. By withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit employees on August 31, 2013, and since September 17, 2013, failing and refusing to comply with and abide by the terms of the 2013–2016 collective-bargaining agreement between the Association and the Union, the Respondent has refused to bargain in good faith with the Union as the exclusive representative of the employees in the unit described above, in violation of Section 8(a)(5) and (1) and of the Act.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not otherwise violated the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I shall require the Respondent to recognize and bargain with the Union, and to honor and comply with the terms and conditions of the 2013–2016 collective-bargaining agreement between the Association and the Union. I shall also require the Respondent to make whole the unit employees for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful repudiation of, and failure to abide by, the collective-bargaining agreement with the Union. The make-whole remedy shall be computed in accordance with *Olge Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

I shall further require the Respondent to make all contractually required contributions to the Union's fringe benefit funds that it failed to make since September 17, 2013, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Moreover, I shall require the Respondent to reimburse the unit employees for any expenses resulting from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Finally, I shall require the Respondent to compensate the unit employees for any adverse income tax consequences of receiving their backpay in one lump sum and file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters for each employee.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[14]

ORDER

The Respondent, Boston & Associates, LLC, Florissant, Missouri, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Withdrawing recognition from and refusing to recognize and bargain in good faith with the International Union of Painters and Allied Trades, District Council #58 (Union), as the collective-bargaining representative of its employees in the appropriate bargaining unit with respect to wages, hours, working conditions, and other terms and conditions of employment.

(b) Failing and refusing to abide by and comply with the terms and conditions of the September 17, 2013 through August 31, 2016 collective-bargaining agreement between the Union and the Painting and Decorating Contractors of America, Chapter #2, affiliated with the Finishing Contractors of America (the Association), which is authorized to bargain on Respondent's behalf, and, absent timely and unequivocal written notice to the Union and the Association, any automatic renewal or extension of it.

(c) In any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain with the Union, and honor and abide by the terms and conditions of the collective-bargaining agreement between the Association and the Union that is effective from September 17, 2013 through August 31, 2016.

(b) Make whole all affected bargaining unit employees for any loss of earnings and other benefits suffered as a result of the Respondent's failure to honor and abide by the terms of the collective-bargaining agreement, with interest, in the manner prescribed in the remedy section of this decision.

(c) Make all contractually required contributions to the Union's fringe benefit funds that the Respondent has failed to make since September 17, 2013, and reimburse the unit employees, with interest, for any expenses resulting from its failure to make the required payments under the collective-bargaining agreement, in the manner prescribed in the remedy section of this decision.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Compensate the unit employees for any adverse income tax consequences of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

(e) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of the Order.

(f) Within 14 days after service by the Region, post at its Florissant, Missouri facility, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 31, 2013.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 4, 2015

Thomas M. Randazzo
Administrative Law Judge

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose a representative to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT withdraw recognition from or refuse to recognize and bargain in good faith with International Union of Painters and Allied Trades, District Council #58 (the Union), as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All journeyman painters, tapers and drywall finishers, paper and wall covering hangers, apprentices, pre-apprentices, summer help and working foreman employed by the Employer, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL honor and comply with the terms and conditions of the September 17, 2013 through August 31, 2016 collective-bargaining agreement between the Union and the Painting and Decorating Contractors of America, Chapter #2, affiliated with the Finishing Contractors of America (the Association), which is authorized to bargain on our behalf, and, absent timely and unequivocal written notice to the Union and the Association, any automatic renewal or extension of it.

WE WILL make whole all bargaining unit employees for any loss of earnings and other benefits they may have suffered as a result of our failure to honor the 2013–2016 collective-bargaining agreement.

WE WILL make all contractually required contributions to the Union's fringe benefit funds that we have failed to make since September 17, 2013, and reimburse all our unit employees, with interest, for any expenses resulting from our failure to make the required payments under the collective-bargaining agreement.

WE WILL compensate all unit employees adversely affected for any adverse income tax consequences of receiving a lump-sum backpay award, and **WE WILL** file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

BOSTON & ASSOCIATES, LLC
(Employer)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

1222 Spruce St. Rm. 8 302
Saint Louis, MO 63103-2818
(314) 539-7770
Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/14-CA-119200 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (314) 539-7770.